CALIFORNIA STATE PERSONNEL BOARD

Date of Issue: 3/19/90

MEMO TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: Reasonable Accommodation Policy for Pregnancy Related Disabilities

INTRODUCTION

The State Personnel Board continues to receive inquiries from departments and employees regarding pregnancy and reproductive fetal hazards. The frequency and nature of the inquiries indicate the need for departments to issue clearly written policies to assist supervisors and managers in dealing with pregnancy and related issues consistently and in conformity with the law and recent rulings. Inappropriate employment policies and practices relating to pregnancy and fetal reproductive hazards can have the effect of illegally denying employment to individuals, either temporarily or permanently.

This memorandum provides the latest information necessary for departments to ensure compliance with the 1978 Pregnancy Discrimination Act. It provides the latest developments and guidelines to facilitate establishing and/or revising departmental pregnancy policies that are consistent and in compliance with the law. These guidelines, however, should not be considered all encompassing. Departments may need to consider additional information when dealing with unique situations and needs. Moreover, since working conditions and employee benefits are subject to collective bargaining, labor relations factors may be involved and should be taken into account.

POLICY

It is State Personnel Board policy that pregnant State employees may continue to work as long as they are able to and their health and the health of the unborn fetus are not adversely affected by continued employment. Departments are required to provide reasonable accommodation when needed to enable a pregnant employee to continue working, unless it would cause the department undue hardship.

DEPARTMENTAL RESPONSIBILITIES

1. Add provisions to accommodate employees disabled because of pregnancy to departmental reasonable accommodation procedures and modified light duty policies, and ensure all employees are informed of and have access to these policies and procedures.

2. Identify substances and/or high risk positions in the workplace that may create potential reproductive or fetal

hazards and inform employees of these conditions. The work in some classifications in State service may present special risks or hazards to pregnant women. (See Attachment A for a guide for assessing positions.)

3. Ensure that pregnant employees are trained and equipped to work safely, and that they are informed of their rights of protection from discrimination due to pregnancy. NOTE: A pregnancy rights brochure is being developed for this purpose and will be issued in the near future.

4. Obtain a medical assessment of the employee's condition and limitations. Ask the employee to provide input from her personal physician and/or seek input from a departmental physician when pregnancy occurs. Each pregnancy must be dealt with on a case-by-case basis.

5. Provide reasonable accommodation in accordance with guidelines set forth in the Personnel Board's Guide for Implementing Reasonable Accommodation; e.g., light duty assignment, temporary job restructuring, special assignment, or voluntary demotion.

   In the case of high risk positions, such as those working with toxic substances, accommodation may be required early in the pregnancy, or even prior to pregnancy and after childbirth when breastfeeding.

6. Provide up to one year leave of absence with mandatory return rights to the former position.

EMPLOYEE RESPONSIBILITIES

1. If reasonable accommodation is or will be necessary because of hazards or high risk exposure to toxic substances, inform the employer of pregnancy or plans for pregnancy.

2. Notify physician of job requirements and possible reproductive or fetal hazards and obtain a doctor's statement which clearly lists any restrictions or limitations for work.

3. Request a pregnancy-related leave of absence in writing, if needed or wanted; file the necessary paper work to obtain nonindustrial disability benefits, if pregnancy results in a disabling condition.

4. Request reasonable accommodation, if necessary, using the steps outlined in the departmental reasonable accommodation procedures.

Attached is a partial listing (see Attachment B) of major laws, rulings and court decisions that impact the pregnant employee, including the administration of pregnancy-related light-duty

assignments, restructured job assignments and leaves of absence. If you have any questions or need any assistance in developing a departmental pregnancy policy, please contact your Affirmative Action and Merit Oversight analyst at the State Personnel Board.

/s/
LAURA M. AGUILERA,
Chief Affirmative Action and Merit Oversight Division

Attach.

Attachment A

Guide for Assessing High-Risk Positions

The following Guide should be helpful in determining whether a position may present special risks or hazards to pregnant women:

1. Given currently available medical information, determine if risk exists. To make this determination, information should be obtained regarding the nature of the specific toxic or other hazard(s) that exist(s) in the workplace. This includes identification of the hazard that poses the risk and the stage of fetal development at which the fetus is actually at risk from the hazard. Particular attention should be given to positions which have exposure to the following:

    a. Climate, temperature extremes
    b. Barometric pressure
    c. Noise, vibration
    d. Radiation
    e. Biological agents
    f. Airborne dusts, fumes, vapors
    g. Chemicals
    h. Special job characteristics; e.g., isolation, confinement, strenuous physical activity and/or lifting, operation of or working near heavy equipment/machinery, irregular shifts, risk of physical confrontation or assault.

2. Assess each risk factor to determine if it is specifically limited to women. Information should be obtained regarding scientific evidence relating to the existence or nonexistence of a substantial risk of fetal or reproductive harm through the exposure of pregnant or fertile female employees or male employees to the hazard.

3. When it is determined that risk exists, then reasonable alternative methods of protecting the employee from the hazard must be explored. Such alternatives could include the use of any devices or techniques, e.g., gas masks or shields, or other protective measures that would reduce risk to within acceptable limits or eliminate the exposure to hazards; this may include temporary or permanent transfers or reassignments.

Attachment B

Laws and Major Court Decisions Relating to Pregnant Employees In the Workplace

LEGAL CONSIDERATIONS

Title VII of the Federal Civil Rights Act of 1964 is the principal federal prohibition against employment discrimination. The purpose of Title VII is to protect workers in hiring, termination, compensation, terms of employment and working conditions. The Pregnancy Discrimination Act of 1978 amended the definition section of Title VII making it clear that discrimination on the basis of pregnancy is sex discrimination. The State of California also prohibits discrimination on the basis of sex. The general rule is that a female employee may not be treated differently from male employees because of her pregnancy or capacity to become pregnant. A policy that expressly excludes women on the basis of pregnancy or capacity to become pregnant, on its face, discriminates against women on the basis of sex, in violation of the law.

Federal Pregnancy Discrimination Act. 1978

The Federal Pregnancy Discrimination Act, which became effective in October 1978, states that discrimination on the basis of pregnancy, childbirth, or related medical conditions is unlawful under Title VII of the Federal Civil Rights Act. This Act ensures that women, affected by pregnancy and related conditions, are treated on the basis of their ability or inability to work. Therefore, it is unlawful to terminate or refuse to hire or promote because of pregnancy. The Act also requires that women unable to work because of pregnancy be accorded disability benefits, sick leave, and health insurance at least on the same basis as employees unable to work for other medical reasons.

Fair Employment and Housing Act

The California Fair Employment and Housing Act (Government Code Section 12945) and corresponding Fair Employment and Housing Commission (FEHC) regulations [Sections 7291.1(d) and 7291.2] also prohibit discrimination on the basis of pregnancy, childbirth or related medical conditions. Under these provisions, specific rules are set forth regarding the treatment of pregnant employees and employees temporarily disabled due to pregnancy, including the areas of reasonable accommodation, transfer to less hazardous or strenuous positions, right to return to original job or to substantially similar job, and unlawful mandatory leave or transfer.

California Occupational Safety and Health Act. 1973

The California Occupational Safety and Health Act provides for employee job safety and health protection. California law

requires that every employer provides a safe and healthful work-place and working conditions. This is accomplished by identifying possible job hazards and correcting them before they lead to employee injury or illness. The issue of reproductive hazards in the workplace has become an evolving area of major concern. It has been difficult for departments to develop and implement policies and procedures in a consistent manner because of limited information such as court decisions. Departments should ensure that any new information concerned with reproductive health hazards receive departmental policy consideration and be made available to supervisors and employees.

Rehabilitation Act of 1973 (Section 503-504) and California Law

The Rehabilitation Act and State Laws (Government Code Sections 19230-19232 and FEHC Regulation Section 7293.9) require employers to make reasonable accommodation to the physical or mental limitations of a disabled applicant or employee, unless the accommodation would impose an undue hardship on the employer. Reasonable accommodation is defined as efforts made on the part of the employer to remove artificial or real barriers which prevent or limit employment of disabled persons. Also, under State law it is unlawful to deny any employment opportunity to a qualified disabled applicant or employee if the basis for the denial is the need to make reasonable accommodation.

California Government Code Section 1 9253.5(d)

California law [Government Code Section 1 9253.5(d)] prohibits a department from terminating an employee for medical reasons, unless it is concluded that the employee is unable to perform the work of his or her present position, or any other position in the agency. Accordingly, a woman disabled by pregnancy or related medical conditions cannot be medically separated unless the department has fully explored alternative job placement within the department and determined that there are no vacant positions available with duties which she can perform.

California Government Code Sections 19991.1 and 19991.6

California Government Code states that the appointing power shall grant a full-time State employee a leave of absence without pay for the purposes of pregnancy or childbirth not exceeding one year. The law also assures the employee the right to return to his or her former position upon expiration of the leave.

California Government Code Section 19878(c)

California Government Code defines "Nonindustrial Disability" to include any illness or injury resulting from pregnancy, childbirth, or related medical condition. Thus, a woman disabled by pregnancy would be entitled to receive nonindustrial disability benefits.

Fair Employment and Housing Act. 1978

This California law requires employers with five or more employees to grant up to a maximum of four months of disability leave, but any time beyond six weeks does not have to be paid. Employers are also required to reinstate pregnant workers to the same or a similar job when they return from disability leave.

RECENT MAJOR COURT DECISIONS AND RULINGS

In California Federal Savings and Loan Association v. Guerra (479 US. 272, [1987]), the Supreme Court upheld the California law which requires employers to give female workers an unpaid pregnancy disability leave of up to four months, guaranteeing that their jobs will be available when they return. The Court rejected arguments that the California law violated the 1978 Pregnancy Disability Act (PDA) that said pregnant workers must be treated the same as, but not better than, workers with other disabilities. The Court ruled that preferential treatment is consistent with the principles of Title VII as amended by the PDA of 1978. This case provided that the PDA does not mandate identical treatment of pregnancy with that of other workplace disabilities. The Court held that Congress did not intend the 1978 Act to limit the benefits for pregnant women but only to be "a floor beneath which pregnancy disability benefits may not drop -- not a ceiling above which they may not rise".

EEOC Policy Guidance. N 915.034. October 7.1988. A number of employers have policies of excluding all women of childbearing capacity from certain jobs because of exposure to hazardous substances or conditions. In October 1988 the EEOC approved guidelines for determining when an employer's fetal protection policy or practice violates the federal anti-discrimination laws. The new guidelines set forth an analytical framework for examining an employer's exclusionary policy based on developing litigation in Zuniga v. Kleberg County Hospital, 30 FEP cases (BNA) 650 (1982); Wright v. Olin Corporation et al., 35 EPD, Paragraph 34, 637, 697 F2d. 1172 (February 1984), Haynes v Shelby Memorial Hospital, 33 EPD, Paragraph 34, 219 (1984).

Under the new guidelines, examination of an employer's policy requires consideration of whether a substantial risk of harm to employees' offspring exists through exposure to a reproductive or fetal hazard in the workplace, whether the harm takes place through the exposure of employees of one sex but not the other, and whether the employer's policy effectively eliminates the risk of fetal or reproductive harm, and there must not exist a reasonable alternative.

EEOC Decision 89-1 (October 5. 1988). The EEOC determined that a hospital violated Title VII by requiring X-ray Technologists to take maternity leave when pregnant. Blanket mandatory maternity leave was unjustified because the employer could monitor radiation exposure which would permit employees to work until

they want to go on leave. The EEOC, in making the determination, relied upon its recently issued fetal protection guidelines.

State of California. Case Na. 24735. A qualified disabled worker, who was injured in the course of his State employment, sought to return to the work force, was willing to relocate to another part of the State to do so, and demonstrated a willingness to accept virtually any position to remain a productive member of society. The Department's only apparent response to this employee was to look for other positions in the employee's district and to send a generalized letter to other return-to-work coordinators in other districts seeking placement. When no response was received to the request, the Department medically terminated the employee. The State Personnel Board ruled in favor of the appellant finding that pursuant to Government Code Section 19253.5(d), the Department did not satisfy its responsibilities to place this worker in a position for which he was qualified and should have considered termination of the employee only if "the employee is unable to perform the work of his or her present position, or any other position in the agency". The Board also found that the Department's limited efforts did not meet the requirements of Government Code Section 19230 and Board policies requiring reasonable accommodation of disabled workers.

Goss v. EXXON Office Svstems Company, 35 EPD, Paragraph 34, 768; 747 F2d. 885 (November 1984). A female sales representative, who resigned after being transferred from her lucrative territory, alleged that she had been subjected to abusive interrogation regarding her desire to have a family, and had been threatened with removal from a large account and was transferred from a lucrative territory as a result of her pregnancy. The Court ruled that such actions constituted unlawful discrimination.

Wright v. Olin Corporation et al., 35 EPD, Paragraph 34, 637, 697 F2d. 1172 (February 1984). The Court ruled that the Olin Corporation showed a valid business necessity to develop a fetal protection policy because of the significant risk of harm posed to unborn children of female employees exposed to certain chemicals and physical agents. The ruling followed a remand by the U.S. Court of Appeal for a showing by the company that the policy was justified by business necessity.

Zuniga v. Kleberg County Hospital,. 30 FEP cases (BNA) 650 (1982). Discharge of a female X-ray Technician because she was pregnant was unlawful sex discrimination. A finding that the policy was justified as a business necessity was reversed. The hospital's unwritten policy requiring termination of pregnant X-ray Technicians without a guarantee of reinstatement deprived women of equal employment opportunities. Business necessity, i.e., the need to protect the hospital from suits arising from fetal damage, did not justify the discriminatory impact of the discharge rule because there existed a less discriminatory

alternative means of achieving the business purpose. The Technician could have been granted temporary leave authorized by the hospital rules for such reasons as personal and family health.

Haynes v. Shelby Memorial Hospital, 34 FEP cases (BNA) 44 (1984). An X-ray Technician who was fired from her job when she became pregnant gained a federal Court order affirming an award of back pay. The Court held that absent any impact on the woman's job performance, the potential for harm to the fetus will not justify an employer policy banning a pregnant woman from holding that job. Moreover, when a policy designed to protect employee offspring from workplace hazards proves racially discriminatory, there is in effect, no defense, unless the employer shows a direct relationship between the policy and the actual ability of a pregnant fertile female to perform the job.